Derek Jones
Plaintiff in Pro Per
3705 West Farm Road
Lompoc, Santa Barbara County
CA 93436-2756
(310) 740-6555
djjones@ucla.edu

FILED
CLERK, U.S. DISTRICT COURT
5/23/24
CENTRAL DISTRICT OF CALIFORNIA
BY: mz DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DEREK JONES,

Plaintiff,

vs.

INNER CITY PRESS, INC.; AND MATTHEW RUSSELL LEE,

Defendants

Case No.: 2:23-cv-09623-MCS-AJRx

Plaintiff's Opposition to Defendants' Amended Special Motion to Strike First Amended Complaint (CCP 425.16) and, in the Alternative, Motion to Dismiss Pursuant to Rule 12(b)(6); Memorandum of Points and Authorities

Hearing Date: June 17, 2024
Hearing Time: 9:00 a.m.
Before the Hon. Mark C. Scarsi

[Declaration of Derek Jones, Declaration of Lindsay Whitney, Request for Judicial Notice filed concurrently]

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I. INTRODUCTION

"White Collar Criminal Linked to Black Eye." What a brilliantly crafted headline. A clever juxtaposition of "white" and "black." A whiff of scandal. A touch of schadenfreude. A convergence of financial crime and violent crime and deserved opprobrium for the sort of person who would commit both. Surely this is a headline that gets readers' attention.

The problem with this headline lies not in its composition but rather in its flagrant disregard for the truth. The scenario it describes is a product of the author's formidable creativity and desperate need for readership at a website he sustains with revenue from Google Ads, LexisNexis, and donations.[1] That author is Matthew Lee, who strategically deployed this same misleading statement -- along with several other fabrications -- in at least five different posts to his website (plus at least one post to his Patreon social media account) over a span of more than four months between November 10, 2022 and March 16, 2023.

Matthew Lee is "an American public interest lawyer, author of the self-published novel 'Predatory Bender,' and founder of two non-profit organizations, Inner City Press and Fair Finance Watch."[2] For all practical purposes, Inner City Press ("ICP") and Matthew Lee are one and the same. On the Patreon social media platform, a single account is hosted by "Matthew Russell Lee: Inner City Press" and the "About" section reads: "I'm Matthew Russell Lee... I cover trials, ask questions, I tweet, write articles and songs like 'The UN Is Corrupt' and 'Cameroon: Where The Internet Was Cut.'[3] On the X (formerly Twitter) platform, his profile is "Matthew Russell Lee for/as Inner City Press."[4]

Neither Lee nor his alter ego Inner City Press is a stranger to controversy. In 2008, Google removed ICP from the Google News platform.[5] In 2012, the United Nations Correspondents Association expelled ICP and "created a Board of Examination to investigate

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[1] See Wikipedia entry for "Matthew Lee (Lawyer)" at http://en.wikipedia.org/wiki/Matthew_Lee (henceforth "Wiki, M. Lee"). Retrieved May 17, 2024 and attached as Exhibit 1 to Declaration of Lindsay Whitney.
[2] Id.
[3] See Patreon page for "Matthew Russell Lee: Inner City Press (henceforth "Patreon, M. Lee") attached as Exhibit 2 to Declaration of Lindsay Whitney.
[4] See X (formerly Twitter) page for "InnerCityPress" (henceforth, "Twitter, ICP") attached as Exhibit 3 to Declaration of Lindsay Whitney.
[5] Wiki, M. Lee.

Lee for allegations of unethical and unprofessional behavior."[6] In 2016, Lee's resident correspondent status at [the] United Nations (UN) was downgraded and his free office cleaned out... [C]onfrontations with Lee have led other journalists to call the police and United Nations security."[7] Lee's own Patreon account indicated that he has been "banned from [the] UN since 3 July 2018."[8]

Former colleagues have published scathing critiques of Lee's work. For example, "Mr. Lee's reporting skills lack credibility... His articles... convey shameless self-promotion... [N]early every sentence written seems to scream 'look at me'."[9] "Other bloggers... frown upon Mr. Lee's behavior as an obnoxious gadfly, atrocious writer, and routinely inaccurate reporter."[10] Most germane to the matter at hand, "Mr. Lee calls himself an 'investigative reporter' but a true reporter acts as a messenger, not a circus barker desperately seeking an audience and attention."[11]

So on November 10, 2022, a certain gadfly found himself in the courtroom of Judge Loretta Preska in the Southern District of New York ("SDNY") for what was supposed to be a routine status conference in a relatively low-profile wire fraud case against Derek Jones. However Lee's "circus barker" proclivities were undoubtedly stirred when the Assistant US Attorney opened with "Your Honor, we have two major topics to address today. One is sentencing and what... issues are disputed and might require a hearing. The other, which the Court is aware but the defense is not, is that the government does have an application for remand."[12]

A. What Actually Transpired at the Status Conference on November 10, 2022

By way of two ex parte transmittals -- the contents of which were entirely unknown to Lee and mostly unknown to Jones prior to their unsealing in April 2024 -- attorneys for the

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[6] Id.
[7] Id.
[8] Patreon, M. Lee.
[9] McGregor, Tom (2012-09-04). "What Is Inner City Press | UN Post." UN Post. Archived from original 2012-09-04. Retrieved May 17, 2024 (henceforth, "UN Post, ICP") and attached as Exhibit 4 to Declaration of Lindsay Whitney.
[10] Id.
[11] Id.
[12] Official Transcript of November 10, 2022 Conference in Southern District of New York Case. No. 21-cr-59 (henceforth, "Transcript"), attached as Exhibit 1 to Declaration of Derek Jones, at 2:24-3:3.

Government alleged they had been contacted by a woman (the "Complainant") who, in turn, claimed that Jones pressured her to submit a letter of support accompanying Jones's May 2022 sentencing memorandum and that the pressure-campaign allegedly included three instances of physical violence. Specifically, the Government alleged that Jones had obstructed justice, tampered with a witness, and thereby violated a condition of his appearance bond necessitating his remand into federal custody. Spoiler alert: Judge Preska denied the Government's request after concluding that the allegations regarding a coerced letter just didn't add up.

After briefly reviewing the Government's ex parte filings and consulting with Jones, defense counsel informed Judge Preska that Jones vigorously and categorically denied pressuring anyone to submit a letter of support on his behalf, and noted the existence of e-mails between the Complainant and Jones's prior counsel corroborating that her letter was entirely voluntary.[13] Defense counsel further informed Judge Preska that Jones never committed any form of physical violence against the Complainant, and that her allegations were perhaps being made in retaliation for Jones having forced Complainant's son to vacate a guest suite in Jones's home.[14] Defense counsel also noted that no charges had been filed in connection with any of Complainant's allegations.[15]

Defense counsel pointed out that "it is a little odd in terms of timing" that the authenticity of a letter of support accompanying Jones's May 2022 sentencing package would be challenged by the Government several months later.[16] The Government acknowledged that the Complainant alleged confrontations with Jones occurred in January, March, and August 2002; however, none of these were temporally connectable with the subject letter of support.[17]

Assistant United States Attorney David Abramowicz acknowledged the existence of "...a video... that's not particularly incriminating, which is why I am disclosing it. At the beginning of the video, the defendant does call the woman a 'crazy bitch' but he does not do

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[13] Transcript at 4:7-14.
[14] Transcript at 5:10-21.
[15] Transcript at 7:20-8:5.
[16] Transcript at 10:17-23.
[17] Transcript at 14:15-17.

anything violent."[18] Additionally, counsel for the Government conceded "I can't speak to why no charges were brought."[19]

Defense counsel chastened the Government for not being more objective and diligent in their analysis of Complainant's allegations -- for example, by evaluating various messages exchanged between the Complainant and Jones regarding the genesis and validity of the letter of support.[20]

Moreover, defense counsel called Judge Preska's attention to the fact that the Complainant expressly stated in her FBI interview that she does not feel threatened by Jones.[21] Judge Preska inquired "What am I supposed to make of that, [AUSA] Abramowicz?"[22]

Defense counsel also volunteered and clarified, "We are willing to agree, as an additional condition here, that [Jones] have no contact and stay away from [Complainant]. There is no desire for Mr. Jones to see this woman."[23]

Judge Preska ultimately denied the Government's remand request, specifically noting "I... take [defense counsel's] point that there might be issues here with the allegations regarding the letter. Accordingly, I will not remand Mr. Jones today..."[24]

The remainder of the Status Conference (approximately one-third) was devoted to a discussion of the scope, duration, and schedule for a hearing to address disputes about the loss amount -- i.e., the principal driver of the Sentencing Guidelines for financial crimes.[25] The parties agreed to meet and confer on Monday, November 14, 2022 and to provide Judge Preska with an indication of what factual issues she would likely be called upon to resolve in advance of a sentencing hearing.[26]

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[18] Transcript at 14:19-23.
[19] Transcript at 15:21.
[20] Transcript at 18:14-21.
[21] Transcript at 18:23-19:2.
[22] Transcript at 19:15.
[23] Transcript at 19:24-20:5.
[24] Transcript at 22:18-20.
[25] See generally Transcript at 23:8-29:7.
[26] Transcript at 24:24-26:24.

In light of the foregoing synopsis -- which constitutes a fair and true report of the proceeding -- a fair and true headline would be "Parties Agree to Confer Re Disputed Loss-Amount After Judge Denies Government's Remand Request." But such a complete and accurate headline is unlikely to capture the number of eyeballs and generate the magnitude of revenue from Google Ads, LexisNexis, and donations that Lee was seeking. And so instead the headline of Lee's post dated November 10, 2022 was "White Collar Criminal Linked to Black Eye and Torn Clothes Is Confined, Derek Jones at Home."

B. What Lee Wrote About the Status Conference Hours, Days, and Then Months Later

Lee's version of the November 10 conference -- a version which he published in at least six different posts -- bears very little resemblance to what actually transpired. As more fully explained below, in addition to his fictitious (sixfold) reference to Jones being "linked to [a] black eye," Lee's version of the Status Conference made use of several other attention-grabbing and deliberately misleading phrases like "photos of domestic abuse" and "photos of physical abuse" and "the photographed victim" and "a letter seeming[ly] obtained by coercion."

Compounding the defamatory impacts of his post he apparently made on November 10, however, Lee subsequently copied and pasted his false narrative about the Status Conference -- verbatim -- into additional posts that he apparently made on November 11, 2022 to his ICP website and his Patreon account, and again on January 12, January 17, and March 16, 2023 to his ICP website. Lee customized the headlines for these subsequent posts as follows:

-- "White Collar Criminal Linked to Black Eye and Torn Clothes Is Banned from 2 Ex Girlfriends" (November 11);

-- "White Collar Criminal Linked to Black Eye Wanted Sentencing Delay But Denied so Jan 17" (January 12);

-- "White Collar Criminal Linked to Black Eye Derek Jones Gets 66 Months As Victim Speaks" (January 17); and

-- "White Collar Criminal Linked to Black Eye Jones Got 66 Months & Denied Surrender Delay" (March 16).

Lee had apparently found a formula that was generating readership and revenue for his ICP website and for his membership-based Patreon account.[27] But each of the posts that accompanied these headlines repeated -- and indeed began with -- exactly the same misleading account of the Status Conference. In other words, although subsequent posts pretend to offer updates to readers about developments in Jones's SDNY case, the November 10 Status Conference remains their central focus. This is evidenced by Lee's choice of headlines (i.e., each and all beginning with "White Collar Criminal Linked to Black Eye...") and by Lee's choice to locate his "version" of the November 10 Status Conference -- in its entirety -- at the beginning of each and all of the subsequent posts. Accordingly, whatever "new" information was contained in the subsequent posts was incidental to Lee's repetition of his misleading account of what occurred on November 10. And what occurred on November 10, if it was ever newsworthy in the first place, certainly did not (and does not) amount to "news" at the time of Lee's postings in mid-January and mid-March.

In reality, the allegations that were recklessly presented by the Government at the Status Conference and then even more recklessly sensationalized by Lee's posts were not revisited or even mentioned again at any subsequent juncture in Jones's SDNY case. As a result, no allegations of coercion or threats or physical violence were under consideration by Judge Preska or any other decisionmaker after approximately 3:30PM EST on November 10, 2022.

II. ANNOTATED INVENTORY OF OFFENDING STATEMENTS

What follows is an inventory of nine statements published by Lee and specifically identified in Jones's First Amended Complaint. This inventory includes citations to the FAC and affidavits filed contemporaneously with Plaintiff's Opposition to the instant motions. It also includes a brief summary of how and why these nine statements are demonstrably false, unprivileged, and damaging to Jones reputationally and financially (hence, the "Offending Statements").

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[27] Patreon, M. Lee, which apparently requires a payment of $5 to "unlock" Lee's post(s). See also Declaration of Lindsay Whitney, ¶ 3.

By way of clarification, the FAC and supporting affidavits identify several additional statements which are also defamatory or constitute false light invasion(s) of privacy. However, the nine Offending Statements summarized below are especially pertinent to defeating the instant motions because they are among the most misleading and most detrimental to Jones's reputation, and because the statements are not connected to any issue that was actually pending before the SDNY court at the time of their publication.

Unless otherwise expressly noted, each and all of the Offending Statements can be found in either the headline (Offending Statement A) or the body (Offending Statements B, C, D, F, G, and H) of at least six different posts by Lee: at least five at www.innercitypress.com and at least one post by Lee via his Patreon account. The dates of the publications, of which Jones is presently aware, in which these Offending Statements appear include: November 10, 2022; November 11, 2022 (website and Patreon); January 12, 2023; January 17, 2023; and March 16, 2023. FAC ¶ 1; FAC Exhibits 1 through 5; Jones Dec. ¶ 13; Whitney Dec. ¶ 3.

Additionally, unless otherwise noted, Jones contends that each Offending Statement: (1) is materially false and unprivileged; (2) creates in the average reader (especially in combination with the other Offending Statements) an impression that Jones has committed or is being prosecuted for or has been deemed culpable of a violent crime, or at least another crime separate and distinct from the financial misconduct at issue in the SDNY case; (3) has a natural and self-evident tendency to damage Jones's reputation; and (4) has proximately caused Jones to be ostracized personally and professionally including but not limited to his removal from positions from which he had been earning not less than $8,000 per month. See, e.g., FAC ¶'s 2, 15 through 17, 31 through 36; Jones Dec. ¶'s 9, 10.

Moreover, no reporting privilege applies to any Offending Statement because it deviates from the substance of the Status Conference so as to produce a different probable effect on the mind of the average reader than would publication of the actual truth. See, e.g., FAC ¶ 3; Jones Dec. ¶'s 7, 8. Also, even if the ICP website were a "public journal" (which Jones disputes), Lee's Patreon account clearly is not. Whitney Dec. ¶ 3.

Offending Statement A: "White Collar Criminal Linked to Black Eye"

As set forth in the FAC -- and as unequivocally articulated during the Status Conference -- Jones denies having committed any act of physical violence whatsoever against the

Complainant or any other person, and specifically denies having committed any act that resulted (or could even conceivably result) in a black eye or any similar injury to the Complainant or any other person. See, e.g., FAC ¶'s 17, 18; Jones Dec. ¶ 7. Moreover, the Status Conference did not include any allegation -- let alone any judicial determination -- that Jones was the cause of a black eye or any similar injury to Complainant or any other person. See, e.g., FAC ¶ 18; Jones Dec. ¶ 7 and Exhibit 1 (Transcript).

Accordingly, Jones contends that this statement presented as "fact" that Jones is "linked to [a] black eye" (implying that Jones inflicted or is at least believed to have inflicted physical violence resulting in a black eye), which is featured in the headlines of at least six distinct publications by Defendants, is demonstrably false and was entirely fabricated by Defendants. See, e.g., FAC ¶'s 17, 18, 28, and 29.

Offending Statement B: "...photos of domestic abuse..."

Offending Statement C: "...photos of physical abuse..."

Offending Statement D: "...the photographed victim..."

As set forth in the FAC -- and as unequivocally articulated during the Status Conference -- Jones denies having committed any act of physical violence whatsoever against the Complainant or any other person. See, e.g., FAC ¶ 17; Jones Dec. ¶ 7. Also, Defendant Lee -- the author of the Offending Statements -- could not have seen any photographs which the Government allegedly received from the Complainant. He was therefore unable to ascertain what they depicted (which in any event was not evidence of "domestic abuse" or "physical abuse" by Jones, who committed no such acts). See, e.g., FAC ¶'s 22 and 25; Jones Dec. ¶'s 5, 6. Moreover, the entire extent of the Government's reference to the alleged contents of any "photos" at the Status Conference was limited to a single fragment of a sentence: "...those photos show injuries and torn clothing." Transcript at 14:12. The Transcript is otherwise entirely devoid of phrases like "photos of domestic abuse" or "photos of physical abuse" or any description whatsoever of the subject matter of any photographs.

Accordingly, Jones contends that these statements presented as "facts" that photographs produced by the Government and discussed at the Status Conference depict instances of "domestic abuse" and "physical abuse" perpetrated against "the photographed victim" (implying that Jones is the perpetrator or has been deemed the perpetrator of such abuse) and

which appear in the text of at least six distinct publications by Defendants, are demonstrably false. See, e.g., FAC ¶'s 17, 22, and 25.

Offending Statement E: "White Collar Criminal Linked to... Torn Clothes"

This phrase appears in the headlines of at least two posts by Lee at www.innercitypress.com and at least one post by Lee to his Patreon account. The dates of the publications of which Jones is presently aware in which Offending Statement E appears include: November 10; and November 11, 2022 (ICP website and Patreon). See FAC ¶ 1; FAC Exhibits 1 and 2; Jones Dec. ¶ 13; Whitney Dec. ¶ 3.

As set forth in the FAC -- and as unequivocally articulated during the Status Conference -- Jones denies having committed any act of physical violence whatsoever against the Complainant or any other person. See., e.g., FAC ¶'s 17, 28, and 29; Jones Dec. ¶ 7. The entire extent of the Government's references to "torn clothes" (or any similar phrase) at the Status Conference was limited to less than two sentences: "...those photos show... torn clothing. The woman says that... these torn clothes were caused by Derek Jones." Transcript at 14:12-14.

Accordingly, Jones contends that this statement presented as "fact" that Jones is "linked to torn clothes" (implying that Jones has been determined by some tribunal to be the proximate cause of said torn clothes) which is featured in the headlines of at least three distinct publications by Defendants, is demonstrably false. See, e.g., FAC ¶'s 17, 28, and 29.

Offending Statement F: "...another former Jones girlfriend who contacted the government about threats..."

As set forth in the FAC -- and as unequivocally articulated during the Status Conference -- Jones denies having issued any threat of any kind, whether to the Complainant or any other person. See, e.g., FAC ¶'s 17 and 25; Jones Dec. ¶ 7. Indeed, the Government provided no specific information about what this (second) woman was alleging.[28] As reflected in the Transcript, the entire extent of the Government's reference to "another former girlfriend" or

[28] Incidentally, Lee's posts refer to someone as a "former Jones girlfriend" when in reality there was no determination (judicial or otherwise) made nor any acknowledgment by Jones concerning the nature or extent of any relationship to this person from whom the Government claimed to have received a phone call. See, e.g., FAC ¶ 25.

any similar phrase was limited to this: "Yesterday the [G]overnment was contacted by another ex-girlfriend of the defendant who was then interviewed by [S]pecial [A]gent Smythe." See e.g., Exhibit 1 to Jones Dec., Transcript at 15:3-5; FAC ¶ 25. The Transcript does not reflect any other reference to "threats" of any sort, let alone threats of physical violence (which is the inescapable implication based on the phrases immediately before and after Offending Statement F in the subject publications). FAC ¶ 25.

Accordingly, Jones contends that this statement presented as "fact" that Jones issued threats (or at least that Jones stands accused of issuing threats) to a former girlfriend, which appears in the text of at least six distinct publications by Defendants, is demonstrably false. See, e.g., FAC ¶'s 17 and 25.

Offending Statement G: "...a letter seeming[ly] obtained by coercion..."

As set forth in the FAC -- and as unequivocally articulated by Jones's counsel during the Status Conference -- Jones denies having coerced the Complainant or any other person to submit a letter of support or any other document. See, e.g., FAC ¶'s 17, 21, and 26; Jones Dec. ¶ 7. In reality, explaining the basis for her decision to "not remand Mr. Jones" Judge Preska specifically noted "I also take [defense counsel's] point that there might be issues here with the allegations regarding the letter." Transcript at 22:18-20

Accordingly, Jones contends that the statement presented as "fact" that a letter was "seeming[ly] obtained by coercion" (implying that it was probable or apparent that Jones deployed some form of coercion in connection with the support letter authored by the Complainant), which shows up in the text of at least six distinct publications by Defendants, is demonstrably false. See, e.g., FAC ¶'s 17, 21, and 26.

Offending Statement H: "...on November 10, a remand or release to home confinement proceeding was held..."

As set forth in the FAC and corroborated by the record in Jones's SDNY case, the subject proceeding over which Judge Preska presided on November 10, 2022 was a status conference -- not a "remand or release to home confinement proceeding." This is clear from, among other things, the official SDNY Minute Entry which accurately memorialized the occurrence of a "Status Conference as to Derek Jones" (FAC Exhibit 8) as well as the cover page of the Transcript of the proceeding which accurately identified a "Conference" (Exhibit

1 to Jones Dec, Transcript at 1). See also FAC ¶ 20. Although the Government did make an ex parte application for remand -- which was denied by Judge Preska ("I will not remand Mr. Jones...") -- the November 10 proceeding was scheduled, in the Government's own words, "so that the Court and the parties can address whether a Fatico [evidentiary] hearing is warranted in this case and, if so, what issues such a hearing should address." FAC Exhibit 7.

Accordingly, Jones contends that the statement presented as "fact" that "a remand or release to home confinement proceeding was held" (implying that Jones's culpability for crimes of violence had already been established and that the purpose of the proceeding was therefore to fashion a punishment), which appears in the text of at least six distinct publications by Defendants, is demonstrably false. See, e.g., FAC ¶'s 17 and 20.

Offending Statement I: "Banned from 2 Ex-Girlfriends"

This phrase appears in the headlines of at least one post by Lee at www.innercitypress.com and at least one other post by Lee via his Patreon account. The date of the publications of which Jones is presently aware in which Offending Statement I appears is November 11, 2022 (website and Patreon). FAC ¶ 1; FAC Exhibit 2; Jones Dec. ¶ 13; Whitney Dec. ¶ 3.

As set forth in the FAC and corroborated by the record in Jones's SDNY case, the language of these headlines does not accurately reflect the reality that at the Status Conference Jones specifically volunteered to continue his self-initiated practice of avoiding interactions with the Complainant and also with the so-called "former Jones girlfriend who contacted the government." See, e.g., FAC ¶ 29. Indeed, the language of these headlines does not even comport with the Defendants' own acknowledgment, appearing in each all of the other publications at issue here, that "Jones's lawyer offered that Jones would see no women at all until sentencing." See, e.g., FAC Exhibit 2; Exhibit 2 to Whitney Dec. Although this is also not a particularly accurate representation of what was said at the Status Conference, it is less misleading than the headline and, importantly, shows that Defendants were fully aware that Jones was not subjected to an involuntary "ban." What Jones's counsel actually said was, without any prompting whatsoever from the Government or Judge Preska, "We are willing to agree, as an additional condition here [of Jones's appearance bond], that [Mr. Jones will] have no contact [with] and stay away from [the Complainant]. We would agree to that

condition. There is no desire for Mr. Jones to see this woman." Transcript at 19:25-20-5.

Accordingly, Jones contends that the statement presented as "fact" that Jones was "Banned from 2 Ex-Girlfriends" (implying that he was involuntarily prohibited from maintaining contact with the Complainant and one other person, rather than having voluntarily offered to continue his self-initiated practice of avoiding any interaction with them whatsoever for multiple months prior to the Status Conference), which appears in the headline of at least two publications by Defendants, is demonstrably false. See, e.g., FAC ¶'s 17 and 29.

In sum, Jones contends that Offending Statement I: is materially false and unprivileged; creates in the average reader (especially in combination with the other Offending Statements) an impression that Jones was involuntarily "banned" from contacting two different women, implicitly owing to concerns about their vulnerability to physical abuse or coercion or "threats" by or from Jones based on some purported precedent for same; has a natural and self-evident tendency to damage Jones's reputation; and has proximately caused Jones to be ostracized personally and professionally including but not limited to his removal from positions from which he had been earning not less than $8,000 per month. See, e.g., FAC ¶'s 2, 15 through 17, 29, 31 through 36; Jones Dec. ¶'s 9, 10.

III. PERTINENT LEGAL STANDARDS

A. Legal Standards Governing Defendants' Motion to Strike

1. The Anti-SLAPP Statute -- CCP section 425.16

CCP § 425.16(b)(1) provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issues shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

"The anti-SLAPP statute was designed to... promptly expose and dismiss meritless and harassing claims..." *Bosley Medical Instruments, Inc. v. Kremer*, 403 F.3d 672, 682 (9th Cir. 2005). Accordingly, "[o]nly a cause of action that both arises from protected speech or petitioning and lacks even minimal merit is a [Strategic Lawsuit Against Public Participation] subject to [a] special motion to strike." *Foundation for Taxpayer & Consumer*

Rights v. Garamendi, 132 Cal.App.4th 1375, 1389 (2005).

The statute is applied in federal court where California law governs the claims asserted, so long as the "federal court [does] not impose a heightened pleading requirement in derogation of federal notice pleading rules." *Thomas v. Fry's Electronics, Inc*., 400 F.3d 1206, 1207 (9th Cir. 2005).

2. The Parties' Respective Burdens Under CCP section 425.16

Defendants (i.e., movants) bear the burden of showing that the speech or conduct at issue is subject to the anti-SLAPP statute. *Equilon Enterprises v. Consumer Cause Inc*., 29 Cal.4th 53, 67 (2002). Specifically, the moving party must show that any statement for which he seeks protection was made in connection with a public issue or an issue of public interest and in the exercise of his protected rights. *Computer Xpress, Inc. v. Jackson*, 93 Cal.App.4th 993, 1001-1003 (2001). "[T]hat a cause of action may have been triggered by protected activity does not entail that it is one arising from such... [T]he statutory phrase 'cause of action... arising from' means... that defendant's act underlying the plaintiff's cause of action must itself have been an act in furtherance of the right of petition or free speech." *City of Cotali v. Cashman*, 29 Cal.4th 69, 78 (2002). The "arising from" requirement is therefore not easily met. Equilon Enterprises, supra, 29 Cal.4th at 92. Courts must "assess the principle thrust [of plaintiff's claim] by identifying the allegedly wrongly and injury-producing conduct... that provides the foundation for the [plaintiff's] claim." *Hylton v. Frank E. Rogozienski, Inc*., 177 Cal.App. 1264, 1272 (2009). If the allegedly protected speech or conduct is "merely incidental to the unprotected activity," the anti-SLAPP protections do not apply. *Salma v. Capon*, 161 Cal.App.4th 1275, 1287 (2008).

Furthermore, Defendant's burden is met only if he proves "the act underlying plaintiff's case fits one of the categories spelled out in § 426.16, subdivision (e)." *Braun v. Chronicle Publishing Co*., 52 Cal.App.4th 1036, 1042 (1997). Specifically, if the challenged statement was made by a direct participant in an official proceeding (i.e., not a third-party "report" of same), or was made in connection with an issue "under consideration" or "under review" by a legislative, executive, or judicial body, then there is no additional requirement that it must be connected with an issue of public importance. For any other statement for which a moving party seeks protection (i.e., one simply made in a "public forum"), the moving party must

also prove the statement concerns "a public issue or an issue of public interest." See, for example, *Garretson v. Post*, 156 Cal.App.4th 1508, 1515 (2007).

If defendants fail to carry this initial burden, the motion to strike must be denied and plaintiff will not be required to address the merits of his claims. *Moore v. Shaw*, 116 Cal.App.4th 182, 194 (2004). If instead defendants make their prima facie showing that protected speech is being challenged in the operative complaint, the matter progresses to "step two" of an anti-SLAPP analysis and the burden shifts to plaintiff to demonstrate that his claims contain at least "minimal merits." Equilon Enterprises, supra, 29 Cal.4th at 67; *Navellier v. Sletten*, 29 Cal.4th 82, 94 (2003).[29]

To resolve potential inconsistencies between anti-SLAPP provisions and the Federal Rules of Civil Procedure, the Ninth Circuit has determined that anti-SLAPP motions to strike (i.e., those which survive the first step of proving the subject speech or conduct is "protected") should instead be reviewed by federal courts under Fed. R. Civ. P. 8 and 12 standards if said motions are founded on purely legal arguments. *Planned Parenthood Fed'n of America v. Center for Medical Progress*, 890 F.3d 828, 834 (2018). When an anti-SLAPP motion to strike instead challenges the factual sufficiency of a claim, then the Fed. R. Civ. P

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[29] What follows is a brief restatement of how California courts have historically analyzed plaintiff's burden relative to this "minimal merits" standard. However, as discussed below, since at least 2018 federal courts in the Ninth Circuit have been instructed to instead utilize a Fed. R. Civ. P. 12(b)(6) standard for anti-SLAPP motions to strike based on purely legal challenges (and a Rule 56 standard for anti-SLAPP motions based on factual challenges). Under California's "minimal merits" standard, the court accepts as true all evidence favorable to the plaintiff. *Consumer Justice Center v. Trimedica International, Inc*., 107 Cal.App.4th 595, 605 (2003). A plaintiff "enjoys a degree of leeway in establishing a probability of prevailing on [his] claims due to the early stage at which the motion is brought and heard and the limited opportunity to conduct discovery." *Integrated Healthcare Holdings, Inc. v. Fitzgibbons*, 140 Cal.App.4th 515, 530 (2006). Accordingly, "the plaintiff's burden of establishing probability of prevailing is not high." *Overstock.com, Inc. v. Gradient Analytics, Inc*., 151 Cal.App.4th 688, 699 (2007). The plaintiff "is not required to prove the specified claim to the trial court; rather, so as not to deprive the plaintiff of a jury trial, the appropriate inquiry is whether the plaintiff has stated and substantiated a legally sufficient claim." *Mann v. Quality Old Time Service Inc*., 120 Cal.App. 4th 90, 105 (2004). Also, when a plaintiff "shows a reasonable probability of prevailing on any part of [his] claim, the plaintiff has established that [his] cause of action has some merit and the entire cause of action stands. Thus, a court need not engage in the time-consuming task of determining whether the plaintiff can substantiate all theories presented within a single cause of action and need not parse the cause of action so as to leave only those portions it has determined to have merit." Id. at 106.

56 standard will apply and discovery must be allowed, with opportunities to supplement evidence based on the factual challenge, before any decision is made by the court. Id. "A contrary reading of these anti-SLAPP provisions would lead to the stark collision of state rules of procedure with the governing Federal Rules... while in a federal district court." Id.

3. Leave to Amend

"[G]ranting a defendant's anti-SLAPP motion to strike a plaintiff's initial complaint without granting the plaintiff leave to amend would directly collide with Fed. R. Civ. P. 15(a)'s policy favoring liberal amendment." *Verizon Delaware, Inc. v. Covad Communications Co*., 377 F.3d 1081, 1091 (9th Cir. 2004). The application of the Rule 15 amendment policy seems all the more salient since the Ninth Circuit clarified the applicability of Rule 12 to anti-SLAPP motions to strike. See Planned Parenthood, supra, 890 F.3d at 834-35. "[I]f there is a contest between a state procedural rule and the federal rules, the federal rules of procedure will prevail." *Hanna v. Plumer*, 380 U.S. 460, 465 (1965).

B. Legal Standards Governing Defendants' Motion to Dismiss (and "Step Two" of the Motion to Strike Inquiry)

1. Federal Rule of Civil Procedure 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) authorizes dismissal of a cause of action for "failure to state a claim upon which relief can be granted." In other words, a complaint must include sufficient factual allegations to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim is facially plausible "when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.

2. The Parties' Respective Burdens in a 12(b)(6) Motion

When considering a 12(b)(6) motion, the court construes the complaint in the light most favorable to the nonmoving party, and accepts all well-pleaded facts as true and draws all reasonable inferences in the plaintiff's favor. *Livid Holdings Ltd. v. Salomon Smith Barney, Inc*., 416 F.3d 940, 946 (9th Cir. 2005); *Wyler Summit Partnership v. Turner Broadcast System, Inc*., 135 F.3d 658, 661 (9th Cir. 1998). See also *Simpson v. AOL Time Warner Inc*., 452 F.3d 1040, 1046 (9th Cir. 2006) (on a Rule 12(b)(6) motion to dismiss, the court must

assume the truth of all material allegations in the complaint and construe them in the light most favorable to the plaintiff).

Under the 12(b)(6) standard, the question is not whether the plaintiff will prevail in the action but whether the plaintiff is entitled to offer evidence in support of the claim. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). In answering this question at this early stage of the proceedings, even if the face of the pleadings suggests that the chance of recovery is remote, the court must allow the plaintiff to further develop the case. *United States v. City of Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981).

3. Leave to Amend

Dismissal without leave to amend is improper unless it is beyond doubt that the complaint "could not be saved by any amendment." Simpson, supra, 452 F.3d at 1046.[30] Moreover, documents filed by a pro se plaintiff are to be "liberally construed, and a pro se complaint, however inartfully pleaded, must be held to less stringent standards than [those] drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 92 (2007). See also Fed. R. Civ. P. 8(f) ("All pleadings shall be construed so as to do substantial justice.")

Additionally, pursuant to Fed. R. Civ. P. 15, leave to file an amended complaint shall be 'freely given' absent a "repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtual of allowance of the amendment, [or] futility of amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962) The Ninth Circuit has "repeatedly held that a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995).

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[30] It is well established that Rule 12(b)(6) motions are viewed with disfavor. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). Accordingly, a court should dismiss a case without leave to amend only in "extraordinary" cases. *United States v. City of Redwood City*, supra, 640 F.2d at 966.

IV. ARGUMENT

A. Plaintiff's Claims Do Not Arise From Protected Activity

Concerning Lee's argument that "Jones'[s] claims arise from protected activity" -- an argument which he advances with only four paragraphs (totaling 27 lines) of conclusory and self-serving statements -- Lee ignores the reality that it is his burden to prove that the offending statements are protected by the anti-SLAPP statute. See, e.g., Equilon Enterprises, supra, 29 Cal.4th at 67 (2002). A defendant can meet this burden only by showing that the offending statements fall within one or four categories of speech or conduct described in CCP § 425.16(e). *Siam v. Kizilbash*, 130 Cal.App.4th 1563, 1569 (2005). Lee cannot meet this burden.

Lee contends that his offending statements are protected by CCP § 425.16 because they were: made in connection with an issue under consideration by a court -- 425.16(e)(2); or made in a public forum and in connection with an issue of public interest -- 425.16(e)(3). However, Lee cannot avail himself (nor his alter ego, co-defendant ICP) of either of these identified bases for protection.

1. The Offending Statements Do Not Relate to Any Issue "Under Consideration" by the SDNY Court.

As to his first alleged basis for protection, Lee fails to recognize that the anti-SLAPP statute does not protect statements about issues which are not directly "under consideration" in any official proceeding at the time of their publication. See, e.g., *Paul v. Friedman*, 95 Cal.App.4th 853, 867 (2002) ("To fall within §425.16(e)[(2)], it is not sufficient the act simply be connected to an official proceeding[;] there must be both a pending proceeding and a connection to an issue before the tribunal").[31]

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[31] Additional guidance regarding what it means for an issue to be "under consideration" (or "under review") can be found in the following cases: *Maranatha Corrections, LLC v. Dept. of Corrections and Rehab*., 158 Cal.App.4th 1075, 1085 (2008) (an issue is "under consideration" by an executive, legislative, or judicial body, as required by CCP § 425.16(e)(2), only when it is "kept before the mind" of an official body, or subject to ongoing inspection or examination); *Cole v. Patricia A. Meyer & Assoc., APC*, 206 Cal.App.4th 1095, 1120 (2012) (defendants failed to establish that publication of an offending statement on their website was protected by CCP § 425.16(e)(2) because the issue that was the subject of the offending statement was no longer pending); and *People ex rel 20th Century Ins. Co. v. Building Permit Consultants*, 86 Cal.App.4th 280, 285 (2000) (offending statements did not warrant protection under CCP § 425.16(e)(2) because there

Here, not a single one of the nine Offending Statements summarized in the Annotated Inventory (Section II, above) relates to any issue actually under consideration by the Southern District of New York -- or any other court -- at any time subsequent to the afternoon of November 10, 2022. Jones Dec. ¶ 8. Even if Lee were to counterfactually argue that his post on the ICP website to which he assigned a dateline of November 10, 2022 were somehow made while the subject(s) of the Offending Statements were still under consideration (i.e., prior to the moment Judge Preska announced her rejection of the Government's request for remand), he cannot credibly allege that his five subsequent posts -- bearing dates between November 11, 2022 and March 16, 2023 and all repeating the same Offending Statements -- related to a matter "kept before the mind of" Judge Preska. See Maranatha, supra, 158 Cal.App.4th at 1085.

2. Neither Lee's Website Nor His Patreon Account Is a Public Forum.

As to his second alleged basis for protection, although neither "public forum" nor "public interest" is defined in the anti-SLAPP statute, Lee fails to acknowledge that California courts have more readily conferred "public forum" status to virtual chatrooms and electronic bulletin boards which draw from a broad community of contributors who provide a variety of viewpoints in a "marketplace of ideas" than to websites like Lee's that convey the viewpoints of only a single individual. See, e.g., *Damon v. Ocean Hills Journalism Club*, 85 Cal.App.4th 468, 475 (2000) (a "public forum" is a place that is open to the public where information is freely exchanged).[32]

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was no issue under consideration in any official proceeding at the time they were made). Moreover, even in the Braun case upon which Defendants rely in their instant motion(s), CCP § 425.16(e)(2) was applicable to reports about an investigative audit because at the time of their publication the matter was still under consideration by the Bureau of State Audits and the *UCSF Medical School Board of Trustees. Braun v. Chronicle Publishing Co*., 52 Cal.App.4th 1036, 1049 (1997).

[32] Additional guidance regarding what constitutes a "public forum" can be found in the following cases: *Lafayette Morehouse, Inc. v. Chronicle Publishing*, 37 Cal.App.4th 855, 863, fn. 5 (1995) ("Newspaper editors or publishers customarily retain the final authority on what their newspapers will publish... resulting at best in a controlled forum not an uninhibited 'public forum'"); and *Weinberg v. Feisel,* 110 Cal.App.4th 1122, 1130 (2003) ("Means of communication where access is selective, such as most newspapers, newsletters, and other media outlets, are not public forums"). In the Barrett case upon which Defendants rely in their instant motion(s), the particular website that was deemed a public forum was a "newsgroup" to which any member could post, and indeed the offending statements at issue

In the unlikely event that Lee could establish (as his anti-SLAPP burden requires) that his ICP website constitutes a public forum, his Patreon social-media account -- which is neither a public-facing "website" nor a "newspaper" and instead requires a "membership" to access -- certainly does not. Whitney Dec. ¶ 3.

3. The Offending Statements Do Not Concern Recognized Matters of Public Interest.

California courts have established a working definition of matters of "public interest" as statements regarding: (a) someone in the public eye; (b) something that affects a large number of people beyond the direct participants; or (c) a topic of widespread public interest -- not mere curiosity. See, for example, *Rivero v. American Federation of State, County & Municipal Employees*, 105 Cal.App.4th 913, 924 (2003).[33]

None of these factors were (or are) present in Jones's SDNY matter generally. And they were certainly not present in relation to a single letter or support allegedly obtained by coercion or isolated instances of physical violence allegedly directed toward one person -- all of which Jones vigorously denies and none of which was publicized, to the best of Jones's knowledge, by anyone other than Lee who boasts that he is the "exclusive" source of the Offending Statements. See, e.g., FAC Exhibit 1. Whereas Lee's analysis focuses on the (overstated) quantity of interest in Jones's SDNY case, he ignores the requirement for proximity between the Offending Statements and the asserted public interest. Accordingly,

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in that case were posted by an individual member -- not the host of the newsgroup. *Barrett v. Rosenthal*, 40 Cal.4th 33, 41, fn. 4 (2006). Likewise, in the Nygard case upon which Defendants rely, even though it determined that a particular Finnish magazine was a public forum, the court acknowledged "The [California] Courts of appeal have disagreed whether a newspaper... is a 'public forum' within the meaning of § 425.16, subdivision (e)(3)." *Nygard, Inc. v. Uusi-Kerttula*, 159 Cal.App.4th 1027 (2008).

[33] Additional guidance regarding what constitutes a "public issue" or a matter of "public interest" can be found in the following cases: *D.C. v. R.R.*, 182 Cal.App.4th 1190 (2010), 1226 ("California cases establish that generally, '[a] public issue is implicated if the subject of the statement or activity underlying the claim (1) was a person or entity in the public eye; (2) could affect large numbers of people beyond the direct participants; or (3) involved a topic of widespread public interest"); and *Weinberg v. Feisel*, supra, 110 Cal.App.4th at 1130 ("[a] matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest...; [t]here should be some degree of closeness between the [offending] statements and the asserted public interest; the assertion of a broad and amorphous public interest is not sufficient")

Lee has not established that any of the Offending Statements meet the prevailing definition of what constitutes a matter of public interest.

B. Plaintiff's Allegations in the FAC Entitle Him to Offer Supporting Evidence and Develop His Case.

Because Lee has failed to prove that his Offending Statements constitute protected speech or activity -- at least not in anything but an incidental manner -- Jones should not be required to defend the merits of his claims under California's anti-SLAPP statute. Nevertheless, because Lee has invoked Rule 12(b)(6) as a separate basis to dismiss the FAC, and insofar the parties apparently agree that a Rule 12(b)(6) standard governs "step two" of any anti-SLAPP analysis undertaken by a federal court, Jones offers the following responses.

1. The Offending Statements and Reasonable Implications Derived From Them Are Demonstrably False and Highly Offensive.

"Perhaps the clearest example of libel per se is an accusation of crime." *Barnes-Hind, Inc. v. Superior Court*, 181 Cal.App.3d 377, 385 (1986). Each of the nine Offending Statements identified in the FAC creates in the average reader, and especially in combination with the other Offending Statements, a false impression that Jones has committed or is being prosecuted for or has been deemed culpable of a violent crime, or at least of another crime separate and distinct from the financial misconduct at issue in the SDNY case. Section II, above, includes extensive citations to the FAC and supporting affidavits that explain how the Offending Statements collectively contribute to this overarching false impression.[34]

Lee argues the impression that Jones has committed (or is being prosecuted for or deemed culpable of a crime other than the SDNY matter) "does not reasonably derive from the Articles." Mem. I/S/O Amended Special Motion ("Amended Motion"), ECF 19 at 20:3-4. While Lee acknowledges that his posts suggest Jones was "linked" to domestic violence, he

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[34] In the context of a defamation action, a statement is false if it would have a different effect on the mind of the reader from that which the actual truth would have produced. *Air Wis. Airlines Corp. v. Hoeper*, 571 U.S. 237, 247 (2014). All that the law requires is that an offending statement is reasonably susceptible to one defamatory meaning, even if it is also susceptible to an innocent interpretation. *Williams v. Daily Review, Inc.*, 236 Cal.App.2d 405, 410 (1965). Additionally, "[i]f the defendant juxtaposes a series of facts as to imply a defamatory connection between them, or otherwise create a defamatory implication, he may be held responsible for the defamatory implication, even when the particular facts are correct." *Weller v. Am. Broad. Co.*, 232 Cal.App.3d 991, n.10 (1991).

argues this was merely "discussed in the context of whether Jones would 'remain at liberty to prepare for sentencing'" and "[t]he only 'sentencing' referred to in the [November 10] post... is the one arising from Jones'[s] guilty plea" in the wire fraud case. Id. at 20:19-25.

However, Lee ignores that in libel cases California courts have emphasized that an offending statement is to be measured by the natural and probable effect upon the mind of the average reader and not its effect on someone trained in the law. See, e.g., *Condit v. National Enquirer, Inc*., 248 F.Supp.2d 945 (2002). Accordingly, so long as an offending statement is reasonably susceptible of a defamatory meaning -- in the mind of the average reader -- a factual question for the jury exists and it is error for a court to rule that such a statement cannot be defamatory on its face. *Selleck v. Globe Int'l Inc*., 166 Cal.App3d 1123, 1131 (1985). Accordingly, Jones contends that each of the Offending Statements, as alleged in the FAC, raises a triable jury question.

Additionally, the proverbial elephant in the room which Lee struggles mightily to avoid is that the headlines of fully six different posts assert that Jones is "linked to [a] black eye." The Transcript of the Status Conference does not include the phrase "black eye" or anything remotely similar. Jones has declared under penalty of perjury that no reference to a "black eye" was made during the Status Conference. Jones Dec. 7. And yet Lee argues "Without presenting a wholly redacted copy of the transcript, Jones cannot demonstrate that no one at the November 10 Proceeding used the term..." Amended Motion, ECF 19 n. 6. Meanwhile, "headlines are not irrelevant, extraneous, or liability-free zones. They are essential elements of a publication..." and false insinuations in a headline are not cured or negated by explanatory language elsewhere. *Kaelin v. Globe Commn's Corp*., 162 F.3d 1036, 1040-41 (9th Cir. 1998). If Lee is asserting -- in good faith -- that obtaining an unredacted transcript of the Status Conference, or perhaps declarations from other participants in same, will be necessary to determine whether Jones was accused of inflicting a "black eye" or similar injury during the Conference (which he most certainly was not), then Lee is raising a question of fact (or the factual sufficiency of Jones's allegations) which invokes a potential Rule 56 standard and in any event translates to Jones's right to conduct discovery.

2. The Offending Statements Do Not Qualify for the Privilege Afforded to "Fair and True Reports" Under Cal. Civil Code Section 47.

An element of defamation is that the offending statement is unprivileged. *Hui v. Sturbaum*, 222 Cal.App.4th 1109, 1118 (2014). However, it is the defendant's burden to prove that the offending statement is within the scope of an available privilege. *Burrill v. Nair*, 217 Cal.App.4th 357, 396 (2013) ("Defendant bears the burden of proving the privilege applies").

Under Civil Code § 47 a statement is privileged if it (1) appears in a "public journal"; and (2) is a "fair and true report"; (3) of a "judicial, legislative or other public official proceeding." A "fair and true" report is one which "captures the substance... of the subject proceedings... measured by the natural and probable effect [the report] would have on the mind of the average reader." *Kilgore v. Younger*, 30 Cal.3d 770, 777 (1982).[35]

As a preliminary matter, it is far from clear that the ICP website constitutes a "public journal" -- a term which is not defined by the statute. The Central District of California has specifically held that a website maintained a single person -- i.e., not subject to oversight or input from any other party -- did not constitute a public journal for purposes of the reporting privilege. *American Dental Assoc. v. Khorrami*, 2004 U.S. Dist. LEXIS 35425, Case No. CV 02-3853 DT. Based on the similarities between the ICP website (which Lee alone apparently maintains and to which Lee apparently alone contributes) and the website at issue in the above-referenced case, it appears unlikely that "public journal" status should be conferred on the ICP website.

However, even if the ICP website were deemed to be a "public journal," as detailed in Section II above, the Offending Statements do not capture the substance of the Status Conference as measured by their natural and probable effect on the average reader. Instead,

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[35] A "slight inaccuracy in the details" will not explode the privilege; what will explode the privilege, however, is an inaccuracy that "affect[s] the reader of the article differently than the actual truth would." *Hayward v. Watsonville Register*, 265 Cal.App.2d 255, 262 (1968). In other words, the privilege will be suspended if the character of the publication deviates so substantially from a proceeding "that it produces a different effect on the reader" than had the reader observed the proceeding himself. *Crane v. Arizona Republic*, 972 F.2d 1511, 1519 (9th Cir. 1992).

as detailed in Section II, the Offending Statements deviate so substantially from what actually transpired at the Status Conference that they bear little resemblance to what the average reader would have gleaned from the proceeding had he (or she) personally attended. Accordingly, Lee cannot meet his burden to prove the Offending Statements are within the scope of the privilege contemplated by Cal. Civil Code § 47.

3. There Appears to Be a Material Factual Dispute About What Transpired at the Status Conference, Which Becomes a Jury Question.

"Whether or not a privileged occasion [potentially] exists is for the court to decide, while the effect produced by the particular words used in an article and the fairness of the report is a question of fact for the jury." Burrill, supra, 217 Cal.App.4th at 398. Specifically, "the fairness and truth of a report is an issue of fact for the jury if there is any material factual dispute on the issue." *Argentieri v. Zuckerberg*, 8 Cal.App.5th 768, 791 (2017).[36]

Here, there are indeed material factual disputes about what was alleged or discussed on the record at the Status Conference. By way of example and not limitation, these apparently include whether Jones was accused of inflicting a "black eye" and whether the subject matter of any photographs provided to Judge Preska could accurately be described as depictions of "domestic abuse" or "physical abuse." The fairness and truth of Lee's posts regarding the Status Conference are thus issues to be resolved by a jury.

4. The Retraction Provisions of Cal. Civil Code Section 48a Do Not Apply to ICP and, In Any Event, Do Not Diminish Defendant's Financial Exposure in this Case.

Pursuant to § 48a of the California Civil Code, in a libel action against a "newspaper," a plaintiff's timely demand for the correction or retraction of an offending statement is prerequisite to his recovery of general or exemplary damages. Otherwise a plaintiff is limited to recovery of special damages (i.e., those "he has suffered in respect to his... business, trade, profession or occupation...").

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[36] A publication is privileged as a matter of law under the fair report privilege only "when there is no dispute as to what occurred in the judicial proceeding reported upon or as to what was contained in the report." *Dorsey v. Nat'l Enquirer, Inc.*, 973 F.2d 1431, 1435 (9th Cir. 1992).

However, the California Supreme Court has confirmed that these protections are limited to publications which engage in the immediate dissemination of news, based on the legislative policy that such enterprises "are most often subject to unwarranted claims for excessive damages in defamation suits, that they cannot always check their sources for accuracy and their stories for inadvertent publication errors, and that such enterprises are peculiarly well situated to publish effective retractions." *Field Research Corp. v. Sup. Ct.*, 71 Cal.2d 110, 115 (1969). Whether a publication "ought to be characterized as a newspaper or not within the contemplation of § 48a [is] a question which must be answered... in terms which justify an expanded barrier against damages for libel in those instances, and those only, where the constraints of time as a function of the requirements associated with production of the publication dictate the result." *Burnett v. Nat'l Enquirer*, 144 Cal.App.3d 991, 1004 (1983).

In 2015, the California legislature amended § 48a -- and the corresponding legislative findings -- to extend the protection to "online publications... which publish breaking news on deadlines indistinguishable from daily newspapers." See Exhibit 5 to Whitney Dec., which contains the full text of Cal. Assembly Bill 998 (2015). However, it expressly does not apply to "casual postings on a social networking Internet Web site, chat room, electronic bulletin board, discussion group, online forum, or other related Internet Web site." Id.

In light of the foregoing, the protections of § 48a do not apply to Lee's posts to the ICP website, and especially not to Lee's posts on the Patreon social networking platform. Nothing suggests that a self-described one-man show with a haphazard posting "schedule" faces urgent publishing deadlines, lead-time to coordinate with editors, or any other constraints that would place ICP under the statute's protection.[37] There was no deadline associated with

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[37] Insofar as § 48a protects "periodicals" -- i.e., media outlets that produce content at regular intervals (i.e., daily, weekly, quarterly, etc.) -- and Lee posts to the ICP website at highly irregular intervals (i.e., sometimes several posts in one day, then no posts for several days), this is yet another reason that his invocation of § 48a protection seems far-fetched. Also, in Burnett, supra, the California Supreme Court indicated that application of § 48a depends not on a publications label as a "newspaper" or "magazine" but rather on its role (or lack thereof) in disseminating breaking news. Specifically, in Burnett the court utilized six factors (in determining that the National Enquirer was not covered by § 48a protection): subscription to wire services; attribution of content to wire services; coverage of politics, sports, and crime (which have a shorter "shelf-life" than other stories); reference to time (i.e., when the events of the article actually occurred); daily generation of content; and lead-time associated with

Lee's decision to post about the Status Conference on November 10, 2022. (He was the only reporter in the courtroom.) And there was no urgency whatsoever associated with Lee's posting of the Offending Statements at least five additional times over a period of four months.

Nonetheless, in an abundance of caution, Jones timely sent two separate retraction demands to Inner City Press, at the mailing address provided on the ICP website. See Exhibits 3 and 4 to Jones Dec. Additionally, Jones has produced an affidavit that in the immediate aftermath of ICP's posts (i.e., in December 2022) he was removed from positions from which he had been earning at least $8,000 monthly. Jones Dec. ¶ 9.

5. Plaintiff's Allegations Can Be Strengthened by Amendment

Jones contends that his claims are facially plausible, as set forth in the FAC, because "the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft, supra, 556 U.S. at 678. Additionally, at this early stage of the proceeding, even if the face of the pleadings suggests that his chance of recovery is remote, the court should allow Jones to further develop his case. Redwood City, supra, 640 F.2d at 966. Accordingly, even if this court were inclined to grant Lee's motion to dismiss, any dismissal without leave to amend would be improper "unless it is beyond doubt that the complaint could not be saved by any amendment." Simpson, supra, 452 F.3d at 1046.

Here, Jones has not had an opportunity to conduct even minimal discovery. Jones Dec. ¶14. And although the operative complaint is the "First Amended Complaint," the original complaint was never served on Defendants. Jones Dec. ¶10. This is because Jones first became aware on or about November 22, 2023 -- shortly after the filing of the original 5complaint -- that Lee had made five additional posts by Lee subsequent to the one dated November 10, 2022 (which was the sole subject of the original complaint.) Jones Dec. ¶'s 11, 12.

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production. Burnett, supra, 144 Cal.3d at 1005. Applying these six Burnett factors to Lee's posts and ICP generally further undermines the credibility of his invocation of § 48a protection.

In addition to amending his complaint to reflect that Jones complied with the retraction-demand requirements of § 48a, Jones is fully prepared to provide exculpatory evidence concerning the Government's allegations at issue in the Status Conference. [38] Jones Dec. ¶15.

V. CONCLUSION

For the reasons set forth above, and in the supporting affidavits and exhibits which accompany this Memorandum, as well as other information to be addressed via oral argument, Jones respectfully requests that this court deny both of Lee's instant motions.

Dated: May 20, 2024 By: _____
Derek Jones, Plaintiff

[38] FN: Additionally, Jones notes with consternation that Lee has incorporated into certain portions of his Amended Motion(s) many of the same distortions of facts and omissions of context with which his reporting has become synonymous. For example, Lee devotes fully 15% of the "Background" section of his Memorandum to conveying barely recognizable versions of two letters submitted to Judge Preska ex parte and under seal. ECF 19 at 9:23-11:2. Lee is fully aware that the contents of these letters -- i.e., unfounded allegations the Government failed to vet, let alone prove -- were not known or knowable to Lee on November 10, 2022 other than the information reflected in the Transcript of the Status Conference. The accompanying Declaration of Derek Jones corrects several of the misstatements in Lee's "Background" section and, with the aid of documentary evidence, shows just how far from the truth Lee's accounts generally reside. See, e.g., Jones Dec ¶'s 7, 15 through 18.